No. 84-495

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD THORNBURGH, *et al.*,
Appellants

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, *et al.*,
Appellees

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE JOHN D. LANE, M.D., *ET AL.*, IN SUPPORT OF APPELLANTS

Counsel of Record:
John E. McKeever
Suite 3600
1600 Market Street
Philadelphia, PA 19103
(215) 751-2200

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED FOR REVIEW

1. In reversing the district court's denial of a preliminary injunction against the operation of a state statute, did the court of appeals exceed the proper scope of review when it held that numerous provisions of the statute are unconstitutional?

2. Did the court of appeals err in holding unconstitutional, as a matter of law, the provisions of Pennsylvania's Abortion Control Act that specify certain types of information to be disclosed to a woman considering an abortion but do not limit the information to be provided?

3. Did the court of appeals err in enjoining the operation of the otherwise constitutional parental consent-judicial authorization provisions of the Act concerning abortions for minors because of the absence of rules by the Pennsylvania Supreme Court concerning the confidentiality and expedition of proceedings thereunder, even though the statute itself contains specific instructions requiring confidentiality and a decision within three business days?

4. Did the court of appeals err in holding unconstitutional the requirement in § 3210 of the Act that a second physician attend a post-viability abortion to provide reasonable medical care for a child who survives the abortion, on the ground that the § 3210(a) exception to "the requirements of this section" in the case of abortions "necessary to preserve maternal life or health" does not apply to the second physician requirement, despite the district court's interpretation to the contrary?

5. Did the court of appeals err in striking down § 3210(b) of the Act by rejecting the district court's constitutional interpretation of that provision in favor of a different interpretation that, in the view of the court of appeals, rendered the statute unconstitutional?

IDENTIFICATION OF AMICI CURIAE JOHN D. LANE, M.D., *ET AL.*, AND OF PARTY SUPPORTED

Pursuant to Rule 36.2 of the Rules of the Court and the previously-filed written consent of the parties to this case, Amici Curiae John D. Lane, M.D., *et al.*, file this brief in support of appellants (hereinafter, the "Commonwealth"). These amici participated as amici both in the district court (175a-176a) and in the court of appeals (5a).* They are physicians (two of whom are certified by the American Board of Obstetrics and Gynecology and one of whom is the parent of an unemancipated minor daughter) and a non-profit corporation that offers counselling services to pregnant women.

* References denominated as ____a are to the Appendix to the Jurisdictional Statement. The Joint Appendix is referred to as J.A. ____a.

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STATEMENT OF THE CASE

This case was initiated on October 4, 1982. In their complaint, plaintiff-appellees allege that Pennsylvania's Abortion Control Act, 18 Pa. C.S.A. § 3201 *et seq.* ("the Act"), is unconstitutional. The Act was signed by the Governor of Pennsylvania on June 11, 1982, almost four months before suit was filed. It contains certain provisions of Pennsylvania's 1974 Abortion Control Act[1] that were up-

1. Former 35 P.S. § 6601 *et seq.* (repealed 1982).

held in *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975) (three judge court), *summarily aff'd sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976), together with other provisions designed to take into account decisions of this Court that were handed down between 1974 and 1982.[2]

Approximately four weeks after filing their complaint, plaintiff-appellees filed, on October 29, 1982, a motion seeking a preliminary injunction. The Act was scheduled to take effect on December 8, 1982.

In response to a November 18 Order of the district court setting a deadline of November 30, 1982, plaintiff-appellees and the Commonwealth entered into a stipulation of facts. The stipulation was made "solely for the purpose of the motion for preliminary injunction." 176a n.1. It expressly states that it was entered into "without prejudice to any party's right to controvert any facts or to prove any additional facts at any later proceeding" in the case. J.A. 9a-10a. As a result of the stipulation, there was no evidentiary hearing on the preliminary injunction motion, and the district court heard oral argument on that motion on December 2, 1982.

On December 7, 1982, the district court issued an Order in which it enjoined the 24-hour waiting period in § 3205(a)(1) of the Act but denied plaintiff-appellees' motion in all other respects. The district court issued its opinion in support of the December 7 Order three days later, on December 10, 1982.

In the meantime, on December 8, 1982, plaintiff-appellees appealed from the district court's Order. That same day, the district court denied a request for an injunction pending appeal. Plaintiff-appellees then requested the

2. An earlier version of the 1982 Act that had been passed by the Pennsylvania legislature was vetoed by the Governor of Pennsylvania on the ground that certain of that bill's provisions were constitutionally suspect. The legislature then passed a new bill in which the suspect provisions were either deleted or modified. The Governor signed that bill, which thus became the Act.

court of appeals to issue an injunction pending appeal. On December 9, 1982, the court of appeals (a) granted an injunction pending appeal "until further order" and (b) set a deadline for the Commonwealth to respond to the request for a stay. After hearing argument, the court of appeals granted the motion for an injunction pending appeal, denied the Commonwealth's motion to vacate the December 9 stay, and ordered expedited consideration of the case.

After expedited briefing and argument, the court of appeals withheld action pending the decisions of this Court that were subsequently issued in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) ("*Akron*"), and *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983) ("*Ashcroft*"). After *Akron* and *Ashcroft* were decided, the parties submitted supplemental briefs and the court of appeals heard argument again.

On May 31, 1984, the court of appeals issued the decision that is now before this Court. Chief Judge Seitz dissented from many of the panel's holdings of unconstitutionality. 132a-152a, 737 F.2d at 312-16.

The Commonwealth requested rehearing *en banc*. That request was denied over the dissents of Chief Judge Aldisert and Judges Adams, Gibbons, and Weis. This appeal followed.

SUMMARY OF ARGUMENT

The court of appeals went beyond the proper scope of review of the district court's decision not to enjoin preliminarily the operation of a state statute. But far more important than the court of appeals' "reaching out" to strike down a carefully tailored state statute is the fact that the court's holdings of unconstitutionality are wrong.

In particular, the court of appeals erred in holding that the disclosure provisions of the informed consent section of the Act should be enjoined. Virtually every one of the disclosure provisions of the Act has been specifically upheld by this Court, and those that have not been specifically addressed by this Court are clearly permissible under the Court's reasoning in prior cases. Under these circumstances, the court of appeals erred in refusing to honor the legislative direction of severability so as to sever the constitutional disclosure standards from the requirements (1) that the disclosures be made 24 hours before obtaining the woman's consent to the abortion and (2) that some of the disclosures be made by a physician.

Similarly, the court below erred in holding that the provisions of the Act concerning parental consent to or judicial authorization of abortions for minors should be enjoined on the ground that the state supreme court had not yet issued supplementary rules of procedure. That ground had already been considered and rejected in *Ashcroft*. The Pennsylvania Act's parental consent-judicial authorization provisions comply in every detail with this Court's decisions. No supplementary court rules are necessary, given the statute's explicit and specific instructions concerning the confidentiality and expedition required in such proceedings.

The court of appeals also ignored the clear language of the Act in holding that there is no statutory exception for medical emergencies in the case of the requirement that a second physician charged with the care of the child who survives an abortion must attend post-viability abortions.

Since the Act does contain a medical emergency exception, it is clearly constitutional under *Ashcroft*.

Finally, the court of appeals erred in rejecting the district court's admittedly constitutional construction of the statutory provision concerning the types of abortion techniques to be used in post-viability abortions in favor of the court of appeals' own unconstitutional construction.

ARGUMENT

I. THE COURT OF APPEALS EXCEEDED THE APPLICABLE SCOPE OF REVIEW OF AN ORDER DENYING PRELIMINARY RELIEF.

The court below had before it an appeal from the denial of a preliminary injunction against the operation of a state statute that had been passed overwhelmingly by the Pennsylvania legislature and signed by the Governor of Pennsylvania after being modified by the legislature to take into account the Governor's concerns over the constitutionality of a prior bill that he had vetoed. When faced with an appeal from a denial of preliminary relief, the courts of appeals normally accord great deference to the district court's balancing of the relevant factors, absent an abuse of discretion, an "obvious" or "clear" error of law, or a serious mistake in considering the proof. See, *e.g.*, *Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 357 (3d Cir. 1980); *Gabrilowitz v. Newman*, 582 F.2d 100, 102 (1st Cir. 1978).

In its decision, the district court carefully weighed the factors relevant to preliminary relief and concluded that plaintiff-appellees had, except as to one provision, failed to meet their burden of showing that the Governor and the legislature of Pennsylvania had more likely than not transgressed constitutional limits. Nevertheless, the court of appeals in this case, in apparent reliance on "an unusually complete factual . . . presentation," 21a, 737 F.2d at 290 — a presentation that was embodied in a stipulation entered into "solely for the purpose of" the preliminary injunction motion (176a n.1) and "without prejudice to any party's right to controvert any facts or to prove any additional facts" later in the case (J.A. 9a-10a) — decided to forgo the "customary discretion accorded to a district court's ruling on a preliminary injunction." 21a, 737 F.2d at 290. Instead, the court of appeals decided as a final matter at least some of "the important constitutional issues at stake" — those the court held to be unconstitutional — on

the basis of its "plenary scope of review as to the applicable law." *Id.*

However, in the case of the three specific provisions that the court of appeals found to be constitutional, it either enjoined the statute's operation anyway or indicated that it would enjoin those provisions if the "unusually complete factual . . . presentation" (21a, 737 F.2d at 290) embodied in the stipulation were supplemented. Thus, the court enjoined the operation of the parental consent-judicial authorization for minors provision on the ground that the Pennsylvania Supreme Court had not yet promulgated rules saying that the Pennsylvania legislature really meant what it specifically said concerning the confidentiality and expedition with which such proceedings should be conducted. Similarly, in refusing to enjoin the prohibition, in § 3210(a) of the Act, of medically unnecessary abortions of viable fetuses, the court stated that it "remain[s] deeply concerned" and that, "*At this stage of the proceeding*, and in light of the Supreme Court's reiteration of the state's power to prohibit abortion of a viable fetus unless medically necessary, *we are compelled* to reject any challenge to the facial validity of this provision." 67a, 68a, 737 F.2d at 299, 300 (emphasis added). See also 57a, 737 F.2d at 297 (where the court stated, in upholding the requirement that abortion facilities file reports concerning their ownership and corporate affiliations, that plaintiff-appellees "have not *as yet* demonstrated a nexus between the disclosure of such information and the chilling of constitutional rights.") (emphasis added).

We agree with the Commonwealth that the court of appeals' thinly disguised hostility to the actions of the legislature and the Governor of Pennsylvania led the court to exceed the proper scope of its review of the district court's disposition of a request for preliminary relief enjoining a state statute. See Jurisdictional Statement at 10-14, citing *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310 (1940), and *Withrow v. Larkin*, 421 U.S. 35 (1975). But

even more important than the court of appeals' rush to prejudgment is the fact that its holdings of unconstitutionality are wrong — in some cases obviously so — as we now show.

II. THE INFORMED CONSENT PROVISIONS OF THE ACT ARE CONSTITUTIONAL.

Section 3205(a) of the Act provides, "No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced." The section also sets disclosure standards that must be met, "[e]xcept in the case of a medical emergency," for consent to be informed within the meaning of the Act. 18 Pa. C.S.A. § 3205(a)(1). Compliance with § 3205 shields a physician from civil liability on the ground of failure to obtain informed consent to the abortion. 18 Pa. C.S.A. § 3205(d).

After carefully reviewing § 3205, the district court concluded that the disclosure provisions of that section "do not interfere with the woman's fundamental right to decide to have an abortion." 213a, 552 F. Supp. at 800. In doing so, it relied in part on the stipulated facts that

> "Women who undergo abortions are not always told of . . . the full nature and effect of the procedure they will undergo. . . . In fact, some of the women who do undergo abortions would not have had an abortion if they were provided with all the information required to be provided by the Act." 207a, 552 F. Supp. at 799.

The court of appeals, on the other hand, held that the informed consent provision of the Act "is invalid, and cannot be enforced." 50a, 737 F.2d at 296. However, the court of appeals never really explains why or how the disclosure standards of § 3205 offend constitutional limitations. It conceded that at least "*some* of the information listed in the Pennsylvania Act would be unobjectionable standing alone," and that "the state may require in general terms that the woman be provided with information needed to

secure her consent." 49a, 737 F.2d at 296. Yet, the court, relying on *Akron*, invalidated § 3205 because its provisions "are not severable." *Id.*

But even assuming *arguendo* that the section is not severable — despite the state legislature's mandate to the contrary in § 5 of the Act, 279a[3] — the court of appeals never identifies even one disclosure provision in § 3205(a) that so taints the whole section as to require the entire section, including its concededly constitutional aspects, to be enjoined.

The reason is clear: each of the disclosure standards of § 3205(a) either has been specifically upheld as constitutionally permissible or is otherwise clearly permissible, as we now show.

1. Section 3205(a)(1)(i) provides that the woman upon whom the abortion is to be performed must be provided with "The name of the physician who will perform the abortion." The court below concedes that this provision is constitutional. 49a, 737 F.2d at 296. Given the emphasis on the physician-patient relationship in this Court's decisions, any argument that it is unconstitutional to require that a woman about to undergo an abortion must be told who will perform the procedure would be frivolous. See *Charles v. Carey*, 627 F.2d 772, 783 (7th Cir. 1980). Indeed, a failure to identify beforehand the physician who will perform the procedure could very well violate common law duties owed by a physician to the patient. See *Perna v. Pirozzi*, 92 N.J. 446, 457 A.2d 431 (1983).

2. Section 3205(a)(1)(ii) requires that the patient be informed that "there may be detrimental physical and psychological effects which are not accurately foreseeable." The identical requirement contained in Pennsylvania's 1974 Abortion Control Act was upheld in *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554, 573, 587-88,

3. We show below that in this case there is no good reason for refusing to honor the legislature's direction of severability. See pages 12-14, *infra*.

594 (E.D. Pa. 1975) (three judge court), *summarily aff'd sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976) ("*Fitzpatrick*"). *Akron* gives no indication that this Court's summary affirmance in *Fitzpatrick* is to be disturbed on this point. Compare *Akron*, 462 U.S. at 451 n.44 (where the Court, in striking down the portion of the ordinance in *Akron* requiring the "humane and sanitary" disposal of fetal remains, distinguished a similar requirement at issue in *Fitzpatrick*). In fact, in *Akron* this Court specifically stated, "Consistent with its interest in ensuring informed consent, a State *may* require that a physician make certain that his patient understands the physical and emotional implications of having an abortion." *Id.* at 445 (emphasis added).

Unlike the ordinance at issue in *Akron*, which spelled out a specific listing of serious complications that had to be told to the patient (see *Akron*, 462 U.S. at 423 n.5, quoting § 1870.06(B)(5) of the Akron ordinance), this provision does not contain a " 'parade of horribles' intended to suggest that abortion is a particularly dangerous procedure." *Id.* at 445.

3. Section 3205(a)(1)(iii) requires that the patient be informed of the "particular medical risks associated with the particular abortion procedure to be employed including, *when medically accurate*, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility" (emphasis added). In *Akron*, this Court specifically approved the informational content aspect of the section of the Akron ordinance which required that a woman be informed of the particular risks of the abortion procedure she is to undergo. 462 U.S. at 446-47. Indeed, that is consistent with what the law requires in the case of *any* medical procedure. See, *e.g.*, 35 P.S. §§ 5641-42 (relating to informed consent requirements in the case of treatment for breast cancer). The *Akron* provision which required that a woman be informed "of the particular risks associated with her own pregnancy and the abortion technique to be employed" (462 U.S. at 446) was struck down only because that provision had other, unconstitutional aspects.[4]

The identification in § 3205(a)(1) (iii) of certain particular categories of risk (*e.g.*, infection and hemorrhage) does not distinguish the informational content of this provision from the informational content of the provision that the Court found acceptable in *Akron*. The categories of risk specified in the Pennsylvania Act need be indicated to a particular patient only when it is "medically accurate" to do so; the determination of medical accuracy is left entirely to the physician's discretion. See Statement of Judge Weis Sur Petition for Rehearing ("Judge Weis' Statement"), at 163a, 737 F.2d at 318.

4. Section 3205(a)(1)(iv) requires that the woman be informed of the "probable gestational age of the unborn child at the time the abortion is to be performed." In *Akron*, the Court held that "[t]his information . . . certainly is not objectionable." 462 U.S. at 445-46 n.37. See Judge Weis' Statement, at 164a-165a, 737 F.2d at 318.

5. Section 3205(a)(1)(v), which requires that the woman be informed of the "medical risks associated with carrying her child to term," is constitutional for the same reasons that requiring information regarding the risks of abortion is constitutional. *Akron*, 462 U.S. at 446-47.

6. Section 3205(a)(2)(i) requires that the woman be informed of the "fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care." In *Akron*, the Court indicated that a similar but much more detailed requirement "certainly is not objectionable." 462 U.S. at 423-24 n.5 (quoting § 1870.06(B)(7) of the Akron ordinance), 445-46 n.37.

7. Section 3205(a)(2)(ii) requires that the woman be informed of the incontrovertible fact that "the father is liable to assist in the support of her child, even in instances where the father has offered to pay for the abortion." Although no

4. In discussing this particular provision of the Akron ordinance, the Court did not address the question of severability. We discuss the severability issue at pages 12-14, *infra*.

such provision was under review in *Akron*, the same reasoning upholding the requirement that a woman be informed of the availability of medical assistance benefits applies to information regarding paternal responsibility for support.

8. Section 3205(a)(2)(iii) requires that the patient be informed of her right to review printed materials that "describe the unborn child and list agencies which offer alternatives to abortion." Under *Akron*, the agency listing requirement is plainly constitutional. See 462 U.S. at 423-24 n.5 (quoting § 1870.06(B)(7) of the Akron ordinance), 445-46 n.37 ("This information, to the extent it is accurate, certainly is not objectionable. . . ."). Furthermore, unlike the ordinance in *Akron*, which required that every woman actually be told detailed information regarding fetal physiology (see § 1870.06(B)(3) of the Akron ordinance, quoted at 462 U.S. at 423 n.5), this provision of the Act leaves the choice up to the woman to decide whether to read such information. See 139a-140a, 737 F.2d at 314 (Seitz, C.J., dissenting); Statement by Circuit Judge Adams Sur Denial of Petition for Rehearing at 157a, 737 F.2d at 316; Judge Weis' Statement, at 164a, 737 F.2d at 318.

Under the Act, the physician — or a counselor[5] — is perfectly free to comment or not to comment on the materials, should the woman express a desire to review them. See 140a, 737 F.2d at 314 (Seitz, C.J., dissenting). No limitation is placed on the content of the discussion between the woman and the physician or counselor. Physicians and counselors remain free under the Act to advocate or "skew" a woman's decision in favor of abortion, if they so desire.

The Supreme Court did not uphold these and other provisions in the *Akron* ordinance even though it found them constitutionally permissible only because these

5. Section 3205(a)(2) explicitly provides that the disclosures contained therein may be made "by the physician *or his agent*" (emphasis added). See 134a-135a, 737 F.2d at 313 (Seitz, C.J., dissenting).

unobjectionable provisions were coupled with other, constitutionally impermissible informational requirements, and because the Akron ordinance required that the information be given to the woman by a physician. The combination of these factors prompted the Court to refuse to sever the valid subsections from the invalid subsections.

But the *Akron* informed consent provision was significantly more complicated, interrelated, and burdensome than the disclosure provisions in § 3205 of the Act. The Court found in *Akron* that the ordinance there in question imposed a " 'parade of horribles.' " 462 U.S. at 445. As a result, it is no wonder that the Court refused in *Akron* to speculate whether the legislative body would retain the permissible portions of the ordinance in the absence of the impermissible portions.

On the other hand, that is not the case with the Pennsylvania Act, where every single disclosure provision is constitutionally permissible. In short, § 3205 does not present a situation where severing a number of unconstitutional provisions from the constitutional informational content provisions would "create a program quite different from the one the legislature actually adopted." *Sloan v. Lemon*, 413 U.S. 825, 834 (1973).[6]

Given the vast difference between the largely impermissible requirements in *Akron* and the completely acceptable disclosure requirements of the Act, this Court should honor the legislative declaration of severability contained in § 5 of the Act. 279a. This is especially appropriate here because the result of implementing the disclosure standards of § 3205 will be to *protect* women considering abortions.

The constitutional right announced in *Roe v. Wade*, 410 U.S. 113 (1973), "was the right of a pregnant woman to decide whether *or not* to bear a child without unwarranted

6. As Chief Judge Seitz pointed out in his partial dissent, 134a-135a, 737 F.2d at 313, the "physician only" requirement applies only to the disclosures contained in § 3205(a)(1); it does not apply to the disclosures contained in § 3205(a)(2). See page 12 n.5, *supra*.

state interference." *Whalen v. Roe*, 429 U.S. 589, 605 n.33 (1977). The Court's holding in *Roe v. Wade* "was not intended to preclude the State from enacting a provision aimed at ensuring that the abortion decision is made in a knowing, intelligent, and voluntary fashion." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 90 (1976) (Stewart, J., concurring). As Justice Powell stated in *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), "The Court recognized [in *Danforth*] that the decision to abort 'is an important, and often a stressful one,' and the State thus constitutionally could assure that the woman was aware of the significance of the decision." 431 U.S. at 705 (concurring opinion) (citation omitted). See also *Danforth*, 428 U.S. at 104 (Stevens, J., concurring in part and dissenting in part) ("The *overriding consideration* is that the right to make the choice be exercised as wisely as possible.") (emphasis added). Section 3205 is narrowly drafted to meet that "overriding consideration."

The court of appeals seemed to assume that § 3205 "imposes objectionable obstacles to 'the responsibility of the physician to ensure that appropriate information is conveyed to his patient. . . .'" 48a-49a, 737 F.2d at 296, quoting *Akron*, 462 U.S. at 443. This conclusion is based on the unstated assumption that § 3205 somehow restricts the content of the dialogue between the patient considering an abortion and the physician or counselor.

But nowhere does the Act prohibit a physician or counselor from furnishing information in addition to that set forth in § 3205. See 140a, 737 F.2d at 314 (Seitz, C.J., dissenting). In fact, § 3205(a)(1)(iii) specifically recognizes that even some of the information set forth therein ("the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility") need not be disclosed, if that information is not medically accurate. Nowhere does the Act preclude a physician from exercising his best medical judgment to tailor information necessary for informed consent to meet the particular needs of the individual woman.

A requirement that *enhances* the right of a pregnant woman to decide "whether *or not* to terminate her pregnancy," *Harris v. McRae*, 448 U.S. 297, 329-30 (1980) (Brennan, J., dissenting) (emphasis added), is constitutional. Section 3205 is designed to protect the woman considering an abortion by insuring that she makes the abortion decision "in a knowing, intelligent, and voluntary fashion." *Danforth*, 428 U.S. at 90 (Stewart, J., concurring). Thus, § 3205 actually advances rather than impinges on the right. Accordingly, it is constitutional, and the court of appeals should be reversed.

III. THE PROVISION OF THE ACT CONCERNING PARENTAL CONSENT TO OR JUDICIAL AUTHORIZATION OF ABORTIONS FOR MINORS IS CONSTITUTIONAL EVEN IN THE ABSENCE OF ANY SUPPLEMENTARY JUDICIAL RULES OF IMPLEMENTATION.

Section 3206 of the Act provides that, except in the case of a medical emergency, a physician shall not perform an abortion upon an unemancipated minor without first obtaining the consent of one of the minor's parents. 18 Pa. C.S.A. § 3206(a). If both parents refuse to consent, or if the minor prefers not to seek the consent of either parent, the minor may petition the courts to authorize the abortion, and the court "shall" authorize the abortion "if the court determines that the [minor] is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent." *Id.*, § 3206(c). Finally, if the court determines that the minor "is not mature and capable of giving informed consent," the court is nevertheless required to authorize the abortion if the abortion "would be in the best interests of the [minor]." *Id.*, § 3206(d).

There can be no doubt that the parental consent-judicial authorization for minors provision of the Act is constitutional under *Bellotti v. Baird*, 443 U.S. 622

(1979) ("*Bellotti-II*") and *Ashcroft*.[7] Indeed, the Act virtually mirrors the requirements that such a provision must meet in order to be constitutional under *Bellotti-II* and *Ashcroft*.[8]

This Court has held that "if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." *Bellotti-II*, 443 U.S. at 643 (footnote omitted). The Commonwealth has provided such an alternative procedure in § 3206(c)-(f) and (h) of the Act. Furthermore, the minor must be able to obtain judicial authorization for the abortion if "she is mature enough and well enough informed to make her abortion decision . . . independently of her parents' wishes." *Id*. The Pennsylvania Act specifically provides that the court "*shall* . . . authorize a physician to perform the abortion if the court determines that the [minor] is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent." 18 Pa. C.S.A. § 3206(c) (emphasis added).

7. The test for the validity of restrictions on the privacy rights of minors, including the right to decide whether to have an abortion, is less rigorous than in the case of restrictions on the privacy rights of adults. See, *e.g.*, *Carey v. Population Services Int'l*, 431 U.S. 678, 693 n.15 and accompanying text (1977) (Brennan, J., joined by Stewart, Marshall, and Blackmun, JJ.). See also *id*. at 703 (Powell, J., concurring). In any event, § 3206 is clearly constitutional under the specific guidelines of *Bellotti-II* and *Ashcroft*.

8. The *Bellotti-II* standards are set forth in Justice Powell's opinion in that case. Although Justice Powell's opinion was joined in by only three other justices, Justice White would have upheld the parental consent statute there at issue, which fell short of the requirements spelled out in Justice Powell's opinion. In any event, although in *Ashcroft* the dissenting members of the Court took issue with the significance of the opinions in *Bellotti-II*, they recognized that, after *Ashcroft*, a parental consent-judicial authorization statute that complies with Justice Powell's decision in *Bellotti-II* is constitutional. *Ashcroft*, 462 U.S. at 503-04. Accordingly, after *Ashcroft*, there is no doubt that the Pennsylvania Act, which meets the standards in Justice Powell's opinion in *Bellotti-II*, is constitutional.

Also, the minor must be able to obtain authorization for the abortion under the alternative procedure "even if she is not able to make this decision independently, [but] the desired abortion would be in her best interests." *Bellotti-II*, 443 U.S. at 644. Again, § 3206(d) of the Act specifically provides that the court "shall" authorize the abortion "[i]f the court determines that the performance of an abortion would be in the best interests of the [minor]."

Finally, the alternative procedure must "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti-II*, 443 U.S. at 644. Section 3206(f) of the Act specifically requires that court proceedings under § 3206 be confidential and be concluded promptly. In fact, the court is required to rule on the minor's petition within three business days of the date the proceeding is initiated, and an expedited confidential appeal is also required. 18 Pa. C.S.A. § 3206(f), (h).[9]

Ashcroft confirms the constitutionality of the Pennsylvania provision. Indeed, the judicial authorization provisions upheld in *Ashcroft* are, if anything, *less* protective of the minor's concerns than is § 3206 of the Pennsylvania Act. For example, the Missouri statute involved in *Ashcroft* required only that "A *hearing* . . . shall be held . . . within five days of the filing of the petition," whereas the Pennsylvania Act requires the court "to *rule* within three business days of the date of the application." Compare Mo. Rev. Stat. § 188.028.2(3), quoted in *Ashcroft*, 462 U.S. at 479-80 n.4 (emphasis added), with 18 Pa. C.S.A. § 3206(f) (emphasis added).

Even though the court of appeals recognized that the carefully crafted parental consent-judicial authorization provision of the Act clearly complies with *Bellotti-II* and *Ashcroft*, the court enjoined the operation of that provision

9. The Act requires that in determining whether to consent to or authorize an abortion for the minor, a parent and the courts must consider only the best interests of the minor. 18 Pa. C.S.A. §§ 3206(a), (d). See *Bellotti v. Baird*, 428 U.S. 132, 140-41, 144-46, 147 (1976).

"until the state promulgates regulations, without prejudice to the right of these . . . plaintiffs to attempt to demonstrate . . . that the regulations are unconstitutional." 56a, 737 F.2d at 297.[10] The court of appeals seems to have interpreted the Act as "*requiring* the Supreme Court of Pennsylvania to promulgate rules assuring confidentiality and promptness of disposition." 54a, 737 F.2d at 297 (emphasis added). It also states that the Pennsylvania Act is not as detailed as the Missouri statute upheld in *Ashcroft*. 53a-54a, 737 F.2d at 297.

However, the Act merely provides that the Pennsylvania Supreme Court "shall" issue such rules "*as may be necessary*" to assure confidentiality and expedition. 18 Pa. C.S.A. § 3206(h) (emphasis added). Compare with Mo. Rev. Stat. § 188.028.2(6) (providing that the state supreme court "shall, by court rule, provide for expedited appellate review . . . . ," 462 U.S. at 491 n.16), upheld in *Ashcroft* in the absence of any supplementary rules.[11] But even more important, this Court has already rejected this exact same ground as a basis for striking down the similar statute at issue in *Ashcroft*. The Court there said:

> "We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. . . . [T]o this point in time, there has been no need for the State Supreme Court to promulgate rules concerning appellate review. There is *no* reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions." 462 U.S. at 491 n.16.

10. Significantly, where, as here, the court of appeals upholds a provision of the Act, it nevertheless leaves open the possibility that the provisions may still be successfully challenged. On the other hand, where it holds that the district court erred in failing to issue a preliminary injunction against other provisions of the Act, it holds those provisions unconstitutional as a final matter.

11. The Pennsylvania Act similarly requires "[a]n expedited confidential appeal" that must take "sufficient precedence over other pending matters to ensure promptness of disposition." 18 Pa. C.S.A. § 3206(h).

See Judge Weis' Statement, at 167a, 737 F.2d at 318 ("I perceive no necessity to await such rules.").

The same applies equally here. The court of appeals erred in assuming that the state courts will fail to fulfill their constitutional — and statutory — obligations to provide confidential and expedited proceedings, including confidential and expedited appeals. Clearly, the Pennsylvania Act "provides the framework for a constitutionally sufficient means of expediting judicial proceedings," 462 U.S. at 491 n.16, and that is all that is required under *Ashcroft*.

Nowhere does the court of appeals indicate what specific procedures in addition to those in the statute itself must, as a constitutional matter, be spelled out in judicial rules in order to permit the statute to take effect. See Judge Weis' Statement, at 168a-169a, 737 F.2d at 318-19. In fact, the Pennsylvania courts are often faced with emergency matters and matters requiring confidentiality, especially in cases involving juveniles. As in the case of most (if not all) other courts, the Pennsylvania courts have emergency judge procedures designed to assure access to a judge at nights or on weekends and holidays. Thus, there *is*, even in the absence of rules specifically applicable to abortions, an "established and practical avenue" to achieve expedition and confidentiality, as sought by the court of appeals. 54a, 737 F.2d at 297. Indeed, the lack of any specific rules of procedure in the federal courts concerning confidentiality has never hampered those who wish to obtain judicial assistance in obtaining abortions from doing so on a confidential basis. That is why the law in this area is replete with case names such as *Roe v. Wade* or *Doe v. Bolton*, for example.

In short, the court of appeals' refusal to permit the parental consent-judicial authorization provisions of the Act to take effect flies in the face of *Bellotti-II* and *Ashcroft*. It should be reversed.

IV. THE REQUIREMENT THAT POST-VIABILITY ABORTIONS BE ATTENDED BY A SECOND PHYSICIAN CHARGED WITH TAKING REASONABLE STEPS TO PRESERVE THE LIFE AND HEALTH OF A CHILD WHO MAY SURVIVE THE ABORTION IS CLEARLY SUBJECT TO A STATUTORY EXCEPTION FOR MEDICAL EMERGENCIES AND IS THEREFORE CONSTITUTIONAL UNDER *ASHCROFT*.

Under *Roe v. Wade* the states may, "[f]or the stage subsequent to viability, . . . even proscribe" abortions except where necessary to preserve the life or health of the mother. *Roe v. Wade*, 410 U.S. at 164-65. If a state may, in the case of viable infants, completely prohibit abortions except where necessary to preserve maternal life or health, *a fortiori* it certainly may require that a second physician with responsibility to protect the life of a viable infant who survives the abortion must be in attendance during the abortion procedure under the same circumstances. See *Margaret S. v. Edwards*, 488 F. Supp. 181, 200-01 (E.D. La. 1980) (upholding a second physician requirement). Thus, this Court upheld such a second physician requirement in *Ashcroft*. 462 U.S. at 494.

Nevertheless, the court of appeals held that the second physician requirement of § 3210(c) of the Pennsylvania Act is unconstitutional because, in its view, the section does not contain an exception for medical emergencies, as required by *Ashcroft*.

In his opinion joined in by Chief Justice Burger, Justice Powell noted in *Ashcroft* that Missouri's second physician requirement "is qualified, at least in part, by the phrase 'provided that it does not pose an increased risk to the life or health of the woman.' " *Ashcroft*, 462 U.S. at 485

n.8. Both Justice Powell and the dissenters agreed that this language does not create "a clear exception for emergency situations." *Id*. at 501 (dissenting opinion). See also *id*. at 485 n.8 (Opinion of Justice Powell).

On the other hand, the Pennsylvania statute at issue here clearly provides, in § 3210(a), that "[i]t shall be a complete defense to *any* charge brought against a physician for violating the requirements *of this section* . . . that the abortion was necessary to preserve maternal life or health" (emphasis added). Since the second physician requirement of § 3210(c) is one of the requirements of "this section" — § 3210 — the Act *does* provide a clear exception to the second physician requirement when, in order to preserve the mother's life or health, it is necessary to perform the abortion without the attendance of a second physician to care for the child. See Statement by Circuit Judge Adams Sur Denial of Petition for Rehearing, at 159a, 737 F.2d at 317.

That the § 3210(a) defense of necessity applies — and was intended to apply — to all of § 3210 and not just to § 3210(a) is clear from the fact that § 3210(c) makes a violation of that "*sub*section" a third degree felony (emphasis added). The use of the term "subsection" in § 3210(c) demonstrates that the Pennsylvania legislature knew how to limit the applicability of the necessity defense to a subsection of the Act if it had chosen to do so. See 144a-145a, 737 F.2d at 315 (Seitz, C.J., dissenting).

Indeed, the Pennsylvania Act is constitutional even under the more stringent test advocated by the dissenters in *Ashcroft*. In *Ashcroft*, Justice Blackmun stated in his dissenting opinion (in which the other dissenters joined), "While I agree [with the majority] that a second physician indeed may aid in preserving the life of a fetus born alive, this type of aid is possible only when the abortion method used is one that may result in a live birth." 462 U.S. at 499. The dissenters made it clear that they viewed Missouri's second physician requirement as "overbroad" and "not tailored to protect the State's legitimate interests" because the Missouri statute (unlike the Pennsylvania Act)

"require[s] a second physician to attend an abortion at which the chance of a live birth is nonexistent," when "any need for a second physician disappears." *Id*. at 500, 501.

However, § 3210(c) of the Pennsylvania Act requires the attendance of a second physician at an abortion when, in the good faith judgment of the physician performing the abortion, the method chosen by the physician "does not preclude the possibility of the child surviving the abortion." Thus, unlike the Missouri statute that was *upheld* in *Ashcroft* (462 U.S. at 494), the Act satisfies both of the two problems that *the dissenters* in *Ashcroft* found with the second physician requirement there at issue.

Accordingly, it is clear — clearer even than in the case of the statute at issue in *Ashcroft* — that the Pennsylvania Act's second physician requirement is subject to a medical emergency exception and is otherwise constitutional under *Ashcroft*.

V. THE REQUIREMENT THAT THE PHYSICIAN USE THE ABORTION TECHNIQUE PROVIDING THE BEST OPPORTUNITY FOR A VIABLE INFANT TO BE BORN ALIVE IS NOT CONTRARY TO THE CONSTITUTION.

Section 3210(b) of the Act provides that, "after an unborn child has been determined to be viable," a physician performing an abortion shall use the abortion procedure "which would provide the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health" of the mother. 18 Pa. C.S.A. § 3210(b).

In an effort to follow the well-established proposition that, if possible, a statute should be construed so as to avoid constitutional infirmities, the district court held that the phrase "significantly greater medical risk to the life or health" of the mother refers to any risk that would — "in

the good faith judgment of the physician," § 3210(b) — influence to *any* extent the physician's determination of the best procedure to be used from the standpoint of the woman's life or health. 242a-249a, 552 F. Supp. at 806-07. As the court of appeals recognized, "Under that construction, if the abortion technique that would save the fetus involves an increased risk to a mother, then the procedure safest for the mother must be used." 69a-70a, 737 F.2d at 300.

Nevertheless, the court of appeals substituted instead its own construction of the statute — a construction it then found to be unconstitutional — on the ground that § 3210(b) "is not susceptible" to a construction that is constitutional. 70a-71a, 737 F.2d at 300.

However, as the district court pointed out, the key term, "significantly greater" medical risk, is clearly susceptible to a constitutional interpretation. In particular, the district court stated:

> "Significant can be understood to mean measurable or worthy of consideration in contrast with insignificant, or not measurable or not worthy of consideration. Websters' Third New International Dictionary defines significant as 'having meaning,' 'having or likely to have influence or effect,' and 'probably caused by something other than chance.' When significant is defined in this way, the term 'significantly greater risk' means any meaningful risk or any risk which would influence the exercise of medical judgment. Thus, the Act requires that after viability, the physician select the technique most likely to result in the live abortion of the viable fetus so long as there is no additional risk to the woman. So interpreted, the statute is constitutional for the reasons stated by the court in *Ashcroft*." 248a-249a, 552 F. Supp. at 807.

See also *The Oxford English Dictionary* (1933), defining "significantly" as "In a significant manner; so as to convey some meaning; expressively, meaningly."

In support of its unconstitutional construction of the Act, the court of appeals cites 2A Sands, *Sutherland Statutory Construction* § 45.11. But the court of appeals ignores that part of § 45.11 to the effect that even " 'a strained construction is not only permissible, but desirable, if it is the only construction that will save constitutionality.' " *Id.* (4th ed. 1984).

The court of appeals also suggests that a constitutional interpretation of § 3210(b) does not comport "with the *probable* intent of the legislature." 70a, 737 F.2d at 300 (emphasis added). The court does not give any citation for its conjecture as to a "probable" unconstitutional intent on the part of Pennsylvania's legislature and Governor, who had vetoed a prior bill because of his concerns over its constitutionality. Instead, the court of appeals relies solely on its view of "the legislative intent reflected in [the statute's] language." *Id.* Of course, that reasoning is circular. It is also contrary to the Pennsylvania legislature's own declaration of its intent, expressed in § 3202(c) of the Act entitled "Construction" (calling for an interpretation that protects the unborn and encourages childbirth to the extent "possible to do so *without violating the Federal Constitution*," emphasis added).

Accordingly, § 3210(b) should be upheld.

CONCLUSION

For the foregoing reasons, amici curiae John D. Lane, M.D., *et al.*, respectfully request the Court to reverse those portions of the court of appeals' judgment invalidating the disclosure standards of § 3205 (including § 3208), the parental consent-judicial authorization provisions of § 3206, the second physician requirement of § 3210(c), and the abortion technique provision of § 3210(b) of the Act.

Respectfully submitted,

John E. McKeever
Suite 3600
1600 Market Street
Philadelphia, PA 19103
(215) 751-2200

CERTIFICATE OF SERVICE

In accordance with Rule 28.5(b) of the Rules of this Court, John E. McKeever, being a member of the Bar of this Court, hereby certifies that three copies each of the foregoing Brief of Amici Curiae John D. Lane, M.D., *et al.*, in Support of Appellants have been served on all parties required to be served, by first class mail at Philadelphia, Pennsylvania, this 15th day of July, 1985. The names and addresses of those parties are:

Honorable Leroy S. Zimmerman
Attorney General, Commonwealth of
Pennsylvania
15th Floor, Strawberry Square
Harrisburg, PA 17120
(Counsel for Appellants)

and

Thomas E. Zemaitis, Esquire
20th Floor, Fidelity Building
123 S. Broad Street
Philadelphia, PA 19109
(Counsel for Appellees)

John E. McKeever
Attorney for Amici Curiae
John D. Lane, M.D., *et al.*